United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

75-4021 B PL

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS and DISTRIBUTORS Petitioner	)	
v.	)	No. 75-4021
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA Respondents.	)	

BRIEF AMICUS CURIAE OF

HENRY GELLER

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v.	)	No. 75-4021
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA Respondents.	)	

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF AMICUS CURIAE OF HENRY GELLER

INTRODUCTORY STATEMENT

Amicus is a former general counsel of the Federal Communications Commission (FCC), now engaged in communications research for the Rand Corporation, which in turn receives grants from non-profit foundations.[1/] As a part of an overall study involving the Commission's informal rule making proceedings, amicus became aware of a serious legal issue concerning such proceedings -- namely, the Commission's present pattern of applying so-called *Sangamon* restrictions.[2/] Accordingly, on December 12, 1974, amicus filed a Petition for Revision of Procedures or For Issuance of Notice of Inquiry or Proposed Rule Making. The petition states (p. 4):

1/The views expressed here are my own, and not those of the Rand Corporation or any sponsoring organization.

2/*Sangamon Valley Television Corp.* v. *U.S.*, 269 F.2d 221 (D.C. Cir. 1959). As developed more fully within, *Sangamon* proscribes *ex parte* presentations by interested private calimants contesting in a rule making proceeding for a valuable privilege.

> In the broadcast field, the Commission's Notice of Proposed Rule Making in the prime time access proceeding contained no *Sangamon* restrictions. See 37 FCC 2d 900, 924 (1972); see also FCC 74-756, par. 16. But the proceeding clearly concerned conflicting industry claims -- advanced by large market network affiliates, independents, the small TV producer, the large TV producer, the networks, etc. -- to a valuable privilege -- namely, access to a specified prime time period for particular types of programming. [footnote omitted] The Commission could not properly entertain *ex parte* presentations by these interested industry groups.

As to applicability to pending proceedings, the petition, after noting that ". . . the matter is one of observance of the law, [and therefore] must be brought to the Commission's attention now, without further delay," states (p. 7):

> Petitioner of course recognizes that several pending proceedings might face some delay, if the Commission agrees with the position stated in this pleading. Petitioner regrets this, particularly as there has already been inordinate delay in resolving, for example, both the pay cable and prime time access proceedings. Petitioner's only suggestion is that the delay can be minimized by expedited procedures: a succinct detailing of the *ex parte* presentations made by interested parties (to be included in the docket with any accompanying papers given the Commission at the time of such *ex parte* presentations), and a three-week period of time to comment on these presentations.

On the same day, amicus brought the petition to the attention of the Commission official with the responsibility of handling claims of improper *ex parte* presentations -- the Executive Director. The December 12, 1974 letter to the Executive Director specifically referred to the petition's direct bearing on the pending Prime Time Access proceeding (PTAR). See Appendix A, attached hereto.[3/]

3/There is thus no impediment to the Court's consideration of this issue. See Section 405, 47 U.S.C. 405. See *Joseph* v. *FCC*, 404 F.2d 207, 210 (D.C. Cir. 1968).

In its action on January 16, 1975, the Commission ignored the above issue, and has done so to date. Amicus therefore believes that it is now a matter for this Court to require the Commission to follow the law and observe "basic fairness" in this important proceeding.

ARGUMENT [4]

SANGAMON PROSCRIBES EX PARTE PRESENTATIONS BY THE CONTESTING PRIVATE CLAIMANTS IN THIS PROCEEDING.

1. *Sangamon*.

Sangamon involved a rule making proceeding proposing to re-assign Channel 2 from Springfield, Illinois to St. Louis, Missouri. The Commission believed that *ex parte* presentations were permissible in such an informal rule making proceeding, and had allowed such presentations to be made by the interested parties. Because of the presentations, the Supreme Court ordered a further hearing before the Court of Appeals (358 U.S. 49). To the Commission's argument concerning the informal rule making nature of the proceeding, the Department of Justice argued (Br. pp. 9-10, Case No. 13992, D.C. Cir.):

> More broadly, we urge that, even were the Commission's procedure silent on this score, considerations of basic fairness would require a ban on *ex parte* pleas in this type of administrative proceeding, involving as it does an allocation of specific channels among several communities, and a resolution of conflicting claims asserted by competing parties in relation to the use of valuabel spectrum rights. The need for fairness cannot turn on whether the label "quasi-legislative" or "quasi-judicial" be applied. The outcome of this proceeding, we emphasize, affected particular interests in a concerte, substantial way. Thus, AM radio frequencies are in fact assigned to particular communities via proceedings

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4/ In view of the nature of the argument presented, amicus relies upon the statements of the case in the briefs of petitioner and respondents.

> labelled "quasi-judicial" (see note 10, *supra*). From this it seems clear that the Court's task of ensuring that an agency has acted "in accordance with the cherished judicial tradition embodying the basic concepts of fair play" (*Morgan* v. *United States*, 304 U.S. 1, 22) is not ended, or necessarily even aided, by attaching one or the other label to the agency proceeding under review. What is important is the substance of the proceeding and the nature of the interests involved. Where , as here, fundamental fairness requires the consideration and resolution of the subject-matter to be conducted on the basis of full, open presentation by the interested parties, no proceeding should be sustained on appellate review where it appears that this basic requirement has not been scripilously observed.

The Court of Appeals agreed, stating:

> . . . On behalf of the United States, the Department urges that whatever the proceeding may be called, it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open. We agree with the Department of Justice. Accordingly, the private approaches to the members of the Commission vitiated its action, and the proceeding must be reopened. 5/

As a result of *Sangamon*, the Commission, in July, 1959, instituted a proceeding proposing rules on *ex parte* communications in non-record rule

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5/*Sangamon Valley Television Corp.* v. *U.S.*, *supra*, 269 F.2d at p. 224. The Court distinguished the *Van Curler* case (*Van Curler Broadcasting Corp.* v. *U.S.*, 236 F.2d 727, 730 (D.C. Cir. 1956)):

> "The *Van Curler* case is not to the contrary. We there held that *ex parte* calls and conversations * * * in regard to the nation-wide intermixture problem, concerning which the Commission was seeking all sorts of advice and information preparatory to setting up a general national-wide rule-making proceeding to deal with intermixture did not vitiate an assignment of a particular channel. We find "nothing improper or erroneous in the Commission's consideration of these interviews as depicted in this record." *Van Curler* . . . the Commission's opinion denying petitioner's request to reopen the record shows that the Commission did not consider these interviews in connection with the particular channel assignment that was before us for review."

making proceedings (FCC Docket No. 12947; 24 F.R. 6057). However, in July, 1965, the Commission terminated the proceeding, without adopting any rules (30 F.R. 9277). The Commission stated that it had operated without any difficulty in the post- *Sangamon* period, by specifying on a case-by-case basis the rule making proceedings to which *Sangamon* standards apply, and that it would continue this practice.

The Commission has thus consistently used the following language to designate the type of informal rule making:

- o If a non-*Sangamon* or "open" proceeding, the Notice reads: "In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it in addition to the specific comments invited by this Notice."[6/]
- o If a *Sangamon* or "closed" proceeding, the Notice states: "All submissions by parties to this proceeding or persons acting on behalf of such parties, must be made in written comments, reply comments, or other appropriate pleadings."[7/]

2. Applicability of *Sangamon* to this proceeding.

In its 1972 Notice initiating this proceeding, the Commission employed the non- *Sangamon* or open language quoted above.[8/] And in its *Further Notice Inviting Comments*, 47 FCC 2d 930, 935 (par. 16) (1974), the Commission again used the above "open" proceeding language. In thus permitting

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6/E.g., Notice of Proposed Rule Making in Docket No. 18110, par. 7 (relating to multiple ownership of AM, FM and TV broadcast stations).

7/E.g., Notice of Proposed Rule Making in Docket No. 20319, par. 11, FCC B29610, Amendment of Sec. 73.202(b), Table of Assignments, FM Broadcast Stations (Bangor, Maine), released January 10, 1975.

8/See Notice of Proposed Rule Making, 37 FCC 2d 900, 925 (par. 60) (1972).

ex parte presentations, the Commission clearly erred.

Sangamon sets forth two criteria: (i) conflicting private claims (ii) to a valuable privilege. The PTAR proceeding fully meets those criteria. As the Court well knows, there are strongly conflicting industry claims to a privilege worth millions to the contestants -- use of or access to a valuable segment of prime time of the network affiliate in the top 50 markets. There is no basis in law or logic to restrict *Sangamon* to its own narrow facts -- a contest for a valuable frequency. As the language of *Sangamon* and common sense indicate, what matters is whether the proceeding -- whether general or of particular applicability -- calls for "resolution of conflicting private claims to a valuable privilege". It cannot be seriously argued that PTAR does not fit that description.

The Commission therefore erred as a matter of law when it adopted the "open" or non- *Sangamon* requirement, and permitted *ex parte* presentations by the private industry entities in this proceeding.[9/] While amicus could rest his position at this point, it should also be noted that *Sangamon* represents sound policy. *Sangamon* does not cut off the Commission from discussion of "broad policy matters with industry representatives"[10/], so important to the discharge of its legislative functions, when there is no pending proceeding. And when these discussions or other circumstances do lead to a proceeding involving "conflicting private claims to a valuable

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9/The adoption of this erroneous procedure, *per se*, requires a remand and remedial action, unless the General Counsel can assure the Court that no *ex parte* presentations by the contesting private industry claimants were made. Amicus believes that no such assurance can be given in light of the Commission's general experience in these "open" proceedings (see quote within of Chairman Wiley, fn. 11), but the burden clearly is upon the Commission to refute the obvious implications of its stated erroneous procedure.

10/*Multivision Northwest, Inc.*, 8 FCC 2d 1151, 1154 (1967); *Report and Order on Rules Governing Ex Parte Communications*, 1 FCC 2d 49, 57 (1965).

privilege", *Sangamon* certainly does not prevent these industry representatives from making their views known to the Commission. Thus, in this proceeding, the private claimants sought and were given several oppurtunities to advance their views, both in writing and orally. What *Sangamon* does prevent is the continuing and particularly the last minute lobbying by the interested industry representatives. By substantially blocking this stultifying process, which the Chairman of the Commission has recently criticized[11/], *Sangamon* markedly serves the public interest.

Nor does *Sangamon* require that the action be taken solely on the "record" submissions. The agency remains free to use materials in its files or to elicit information or data from non-interested outside sources

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11/Thus, in a speech to the Federal Communications Bar Association, on April 30, 1974 (FCC Mimeo. 21343), Chairman Wiley stated (p. 4)

> There is one other lobbying technique which disturbs me although I would acknowledge that it is largely due to a somewhat unfortunate practice on the part of the FCC. I mention it today because I want to put you on notice of my intention to change this practice wherever possible. When the Commission holds an oral argument on some rule-making matter, we carefully divvy up the advocacy time available among various parties. When the argument is completed, the Commissioners should then be in the best position possible to make a tentative decision on the merits. Typically, however, such a decision is not made until long after the conclusion of the formal argument. During the delay until decision, oral argument often continues informally in the privacy of individual Commissioner and staff offices. I simply do not think this is a good practice and, accordingly, and to the extent practicable, I hope to have the Commission making tentative judgments very quickly following oral argument, thus obviating the possibility of any further seriatim presentations . . . Compromises, fallback positions, and the so-called "real facts" are often reserved for supplemental filings and, perhaps, subsequent visits to Commission offices.

Indeed, this lobbying process may have been a contributing factor leading to the Commission's February 6, 1974 Report, 44 FCC 2d 1081, which was criticized by the Court as "simply compromis[ing] between the interests of different broadcasting groups and gloss[ing] over the more fundamental public interest." *NAITPD* v. *FCC*, 502 F.2d 249, 257-58 (2d Cir. 1974).

(of course, if it relies on such material, it should disclose this in setting forth the basis of its decision).[12/] *Sangamon* simply requires that the interested private claimants to the valuable privilege proceed on the record.[13/]

CONCLUSION

There are two other points to be noted. First, amicus does not believe that the Commission's error reflects adversely upon it, or should be the basis of criticism for those parties who made *ex parte* presentations in line with the Commission's, in effect, invitation to do so. Amicus recognizes the good faith purpose of the Commission's processes here -- the "need for communication between the Commission and the industry concerning . . . problems of mutual interest" (*Report on Rules Governing Ex Parte Communications*, *supra*, 1 FCC 2d at p. 57). Indeed, as a former senior Commission official, amicus also failed to recognize the applicability of *Sangamon* and to note the pattern of ignoring *Sangamon*, whenever the proceeding involves general issues, even though those issues in turn call for "resolution of conflicting private claims to a valuable privilege".

Second, it may be that requiring the Commission to observe proper

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12/See Attorney General's Manual on the Administrative Procedure Act, pp. 31-32 (1947). Amicus also believes that *Sangamon* is applicable only where there are conflicting claims by private industry entities to a valuable privilege, and not to rule making proceedings where conflict stems from the participation of listener or other public groups.

13/Amicus is not urging that *Sangamon* restrictions be applicable only to the interested private claimants. If the Commission does adopt such restrictions in a particular proceeding, it would seem appropriate simply to specify that *all* parties should proceed in accordance with the prescribed procedures for written or oral presentations. Thus, disinterested parties (e.g., law professors; "think-tanks") would also be required to follow the stated procedures. See *Sangamon Valley Broadcasting Corp.* v. *U.S.*, *supra*, 269 F.2d at pp. 224-25, holding that specified procedures must be adhered to.

procedures will result in some further delay in settling a matter that clearly calls for early resolution in the public interest. If the Court should reverse again on some issue on the merits,[14/] no delay would result from also requiring the Commission to observe *Sangamon*. Rather, the Commission could readily remedy the past error by the procedure suggested by amicus (see p. 2, *supra*) and would also be acting properly as to the further proceedings on the remand issue. If, however, the Court finds no error on the merits, then a remand would still be necessary on the procedural point raised by amicus. It may be argued that such further delay is not only unfortunate in view of the history of this proceeding but would be of little practical utility -- that the Commission, having been affirmed by the Court on the merits, would simply go through the motions of affording "basic fairness" concerning the *ex parte* presentations, with the result a foregone conclusion. Perhaps so. But observance of proper procedural requirements -- of "basic fairness" -- cannot be sloughed aside, without undermining the fundamental notion of the rule of law.

This Court should therefore remand the case to the Commission, with instructions to set out the essence of any oral *ex parte* presentations (with any written submissions also placed in the docket), and to afford the interested parties the opportunity to address themselves to these presentations.

14/Amicus urges that in any event the Court should consider the merits, and afford guidance to the Commission and the industries as to the basic legal issues concerning PTAR III.

Respectfully submitted,

Henry Geller

Room 714
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February 18, 1975

APPENDIX A

2104 Pickwick Lane
Alexandria, Va. 22307
December 12, 1974

Mr. Richard D. Lichtwardt
Executive Director
Federal Communications Commission
Washington, D.C. 20554

Dear Mr. Lichtwardt:

I filed the enclosed petition today. While it requests general procedural revisions, it does bear directly on several pending proceedings. Two, in particular, are treated as examples in the petition: The prime time access proceeding (Docket No. 19622) and the pay cable proceedings (Docket 19554). I therefore thought it appropriate to bring this petition to your attention.

Sincerely yours,

Henry Geller

HG:sc

Enclosure

CERTIFICATE OF SERVICE

I, Henry Geller, hereby certify that the foregoing "Motion For Leave to File Brief Amicus Curiae" and "Brief Amicus Curiae of Henry Geller" were served this 18th day of February, 1975 by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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